

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

KIRK LUSTER, ) No. ED CV 12-1796-PLA  
Plaintiff, )  
v. ) **MEMORANDUM OPINION AND ORDER**  
CAROLYN W. COLVIN, )  
ACTING COMMISSIONER OF SOCIAL )  
SECURITY ADMINISTRATION, )  
Defendant. )

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I.

**PROCEEDINGS**

Plaintiff filed this action on October 22, 2012, seeking review of the Commissioner's denial of his application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on March 18, 2013, and April 18, 2013. Pursuant to the Court's Order, the parties filed a Joint Stipulation on March 26, 2013, that addresses their positions concerning the disputed issue in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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## BACKGROUND

Plaintiff was born on November 28, 1965. [Administrative Record ("AR") at 93-94.] He has a tenth-grade education [AR at 194], and past relevant work as a dish washer. [AR at 191.]

On July 9, 2009, plaintiff protectively filed an application for Supplemental Security Income payments, claiming an inability to work since June 30, 2008, due to diabetes, high blood pressure, a gunshot wound in his left leg, a pin in his left hand, and mental problems, including depression, attention deficit hyperactivity disorder, bipolar disorder, and schizophrenia. [AR at 93-94, 168-71, 189-95, 217-23.] After his application was denied initially and upon reconsideration, plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). [AR 95-115.] A hearing was held on May 5, 2011, at which plaintiff appeared with counsel and testified on his own behalf. A medical expert and a vocational expert (“VE”) also testified. [AR at 33-90.] On June 22, 2011, the ALJ found that plaintiff was not disabled. [AR at 20-28.] On September 12, 2012, the Appeals Council denied plaintiff’s request for review. [AR at 1-3, 16.] This action followed.

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## **STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, the term “substantial evidence” means “more than a mere scintilla but less than a preponderance -- it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at 1257. When determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court

1 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,  
 2 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

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4 **IV.**

5 **THE EVALUATION OF DISABILITY**

6 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
 7 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
 8 expected to result in death or which has lasted or is expected to last for a continuous period of at  
 9 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

10

11 **A. THE FIVE-STEP EVALUATION PROCESS**

12 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
 13 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
 14 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must  
 15 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
 16 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
 17 substantial gainful activity, the second step requires the Commissioner to determine whether the  
 18 claimant has a “severe” impairment or combination of impairments significantly limiting his ability  
 19 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
 20 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
 21 the Commissioner to determine whether the impairment or combination of impairments meets or  
 22 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404,  
 23 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.  
 24 If the claimant’s impairment or combination of impairments does not meet or equal an impairment  
 25 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has  
 26 sufficient “residual functional capacity” to perform his past work; if so, the claimant is not disabled  
 27 and the claim is denied. Id. The claimant has the burden of proving that he is unable to perform  
 28 past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie

1 case of disability is established. The Commissioner then bears the burden of establishing that  
 2 the claimant is not disabled, because he can perform other substantial gainful work available in  
 3 the national economy. The determination of this issue comprises the fifth and final step in the  
 4 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966  
 5 F.2d at 1257.

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7 **B. THE ALJ'S APPLICATION OF THE FIVE-STEP PROCESS**

8 In this case, at step one, the ALJ found that plaintiff had not engaged in any substantial  
 9 gainful activity since July 9, 2009, the date of the application. [AR at 22.] At step two, the ALJ  
 10 concluded that plaintiff has the severe impairments of schizoaffective disorder, polysubstance  
 11 dependence, history of gunshot wound to left hand and left leg, status post-open reduction internal  
 12 fixation of left hand with residual hardware, and diabetes. [Id.] At step three, the ALJ determined  
 13 that plaintiff's impairments do not meet or equal any of the impairments in the Listing. [Id.] The  
 14 ALJ further found that plaintiff retained the residual functional capacity ("RFC")<sup>1</sup> to perform less  
 15 than a full range of light work as defined in 20 C.F.R. § 416.967(b),<sup>2</sup> "that is: [plaintiff] can lift  
 16 and/or carry 20 pounds occasionally and 10 pounds frequently; he can sit for six hours in an 8-  
 17 hour workday with normal breaks; he can stand and/or walk for six hours in an 8-hour workday  
 18 with normal breaks; he can use his non-dominant left hand for fine/gross manipulation on an  
 19 occasional basis; he can [d]o simple repetitive tasks with no interaction with the public and only  
 20 non-intense interaction with coworkers and supervisors; he cannot do fast paced work or work that  
 21 requires hypervigilance, including be responsible for the safety of others." [AR at 23.] At step  
 22 four, the ALJ concluded that plaintiff was not capable of performing any past relevant work. [AR  
 23 at 26.] At step five, the ALJ found, based on the vocational expert's testimony and the application

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25 <sup>1</sup> RFC is what a claimant can still do despite existing exertional and nonexertional  
 26 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

27 <sup>2</sup> 20 C.F.R. § 416.967(b) defines "light work" as work involving "lifting no more than 20  
 28 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds" and  
 requiring "a good deal of walking or standing" or "sitting most of the time with some pushing and  
 pulling of arm or leg controls."

1 of the Medical-Vocational Guidelines, that “there are jobs that exist in significant numbers in the  
2 national economy that [plaintiff] can perform.” [AR at 26-27.] Accordingly, the ALJ determined  
3 that plaintiff has not been under a disability since July 9, 2009. [AR at 27.]

4  
5 **V.**

6 **THE ALJ’S DECISION**

7 Plaintiff contends that there are unexplained conflicts between the Dictionary of  
8 Occupational Titles (“DOT”) and the vocational expert’s testimony that an individual with plaintiff’s  
9 limitations can perform the job of counter clerk. [Joint Stipulation (“JS”) at 2-6.] As set forth below,  
10 the Court respectfully disagrees with plaintiff and affirms the ALJ’s decision.

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12 **ALJ’S FAILURE TO EXPLAIN HIS DEVIATION FROM THE DOT OR OBTAIN A REASONABLE  
EXPLANATION FROM THE VOCATIONAL EXPERT**

13  
14 Plaintiff argues that because his RFC precludes interaction with the public, fast-paced work,  
15 and hypervigilance, he would be unable to perform the job of counter clerk, the only job the ALJ  
16 relied upon at step five to conclude that plaintiff is not disabled. [JS at 3-5.] Plaintiff further  
17 contends that “[n]either the ALJ nor the VE articulated reasons for deviating from the DOT,” and  
18 that the ALJ therefore erred in determining that plaintiff can perform this job. [JS at 6.]

19 “[T]he best source for how a job is generally performed is usually the Dictionary of  
20 Occupational Titles.” Pinto v. Massanari, 249 F.3d 840, 845-46 (9th Cir. 2001) (citing Johnson v.  
21 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)). The DOT raises a presumption as to job  
22 classification requirements. See Johnson, 60 F.3d at 1435. An ALJ may rely on VE testimony that  
23 varies from the DOT description of how a job is performed “only insofar as the record contains  
24 persuasive evidence to support the deviation.” Light v. Soc. Sec. Admin., 119 F.3d 789, 793 (9th  
25 Cir. 1997) (citing Johnson, 60 F.3d at 1435). Moreover, “when a VE … provides evidence about  
26 the requirements of a job or occupation, the [ALJ] has an affirmative responsibility to ask about any  
27 possible conflict between that VE … evidence and the information provided in the DOT.” Social

1 Security Ruling<sup>3</sup> 00-4p. SSR 00-4p further provides that “[i]f the VE’s ... evidence appears to  
 2 conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.”  
 3 Id. Nevertheless, the ALJ’s failure to ask the VE about potential conflicts and obtain a reasonable  
 4 explanation for any conflicts is harmless error where there is no actual conflict or where the VE has  
 5 “provided sufficient support for her conclusion so as to justify any potential conflicts.” Massachi v.  
 6 Astrue, 486 F.3d 1149, 1154 n.19 (9th Cir. 2007).

7 In his RFC determination for plaintiff, the ALJ found that plaintiff has the ability to perform  
 8 less than a full range of light work, but is precluded from interaction with the public, fast-paced  
 9 work, and work that requires hypervigilance. [AR at 23.] At plaintiff’s administrative hearing, the  
 10 ALJ asked the vocational expert to assume a hypothetical person of plaintiff’s age, education, past  
 11 relevant work experience, and with all of the limitations that the ALJ determined plaintiff has,  
 12 including the following limitations: “no interaction with the public,” “no tasks requiring hyper-  
 13 vigilance,” and “no fast-paced work.” [AR at 80.] When the VE was asked whether such an  
 14 individual could perform jobs in the national economy other than plaintiff’s past work, she first  
 15 identified the job of “order clerk in food and beverage.” [AR at 81.] When the ALJ reiterated, “we  
 16 want no interaction with the public,” the VE withdrew that job “because [it involves] telephone  
 17 contact with the public.” [Id.] The VE then identified the job of counter clerk, which is described  
 18 at DOT No. 249.366-010. When the ALJ asked, “And that job would not involve any public  
 19 interaction?” the VE testified: “No. It’s working with a machine.” [Id.] When the ALJ asked the  
 20 VE whether her testimony was consistent with the DOT, she testified that it was. [AR at 83.] Later  
 21 during the VE’s testimony, plaintiff’s counsel and the VE had the following two colloquies about  
 22 the job of counter clerk:

23 [Counsel]: What exactly do you do as a counter clerk?

24 [VE]: A counter clerk is -- it’s in photo finishing -- so it’s running the  
 25 film and processing up through the machine. ...

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26 <sup>3</sup> Social Security Rulings (“SSR”) do not have the force of law. Nevertheless, they “constitute  
 27 Social Security Administration interpretations of the statute it administers and of its own  
 28 regulations,” and are given deference “unless they are plainly erroneous or inconsistent with the  
 Act or regulations.” Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 [Counsel]: Okay.

2 [VE]: [Inaudible.]

3 [Counsel]: Is that always in that -- that setting -- photo finishing?

4 [VE]: That particular one.

5 [Counsel]: All right. Thanks.

6 \*\*\*

7 [Counsel]: Is it a setting like a drug store where you have a -- like a Rite  
8 Aid where they have a photographic department versus --

9 [VE]: No. More in -- more of a lab. There are the one-hour ones like  
10 you see in the pharmacies or in the box stores are sort of open  
11 to the public and everybody does both the cashiering as well  
as that. But this would be more in a lab where the film is sent  
off.

12 [AR at 83-84, 88-89.] In his decision, the ALJ relied on the VE's testimony to find that plaintiff can  
13 perform the job of counter clerk. The ALJ therefore concluded that plaintiff can perform jobs that  
14 exist in significant numbers in the national economy and determined that plaintiff is not disabled.

15 [AR at 26-27.]

16 The Dictionary of Occupational Titles describes the job of counter clerk as follows:

17 Receives film for processing, loads film into equipment that  
18 automatically processes film for subsequent photo printing, and  
collects payment from customers of photofinishing establishment:  
Answers customer's questions regarding prices and services.  
Receives film to be processed from customer and enters identification  
data and printing instructions on service log and customer order  
envelope. Loads film into equipment that automatically processes  
film, and routes processed film for subsequent photo printing. Files  
processed film and photographic prints according to customer's name.  
Locates processed film and prints for customer. Totals charges, using  
cash register, collects payment, and returns prints and processed film  
to customer. Sells photo supplies, such as film, batteries, and  
flashcubes.

24 DOT No. 249.366-010.

25 Plaintiff first contends that there is a conflict between the DOT's description of the job of  
26 counter clerk and the VE's testimony that an individual with plaintiff's limitations can perform this  
27 job because the job requires public interaction. Plaintiff accurately notes that the DOT's  
28 description of the job of counter clerk conflicts with the VE's testimony describing this job. DOT

1 No. 249.366-010 states that a counter clerk interacts with customers by answering questions,  
 2 receiving film, retrieving film, and collecting payment. DOT No. 249.366-010. The VE explicitly  
 3 testified, however, that the counter clerk job she identified does not involve any public interaction.

4 Despite the fact that there is a conflict between the DOT's description and the VE's  
 5 description of the job of counter clerk, the Court finds that the VE's testimony provides sufficient  
 6 support for her conclusion to justify this conflict. After the VE's initial identification of the job of  
 7 counter clerk, counsel asked the VE in what type of setting this job is performed, and specifically  
 8 asked whether it is performed "in a setting like a drug store." The VE responded, "No. More in --  
 9 more of a lab." She explained that while there are film processing locations that are "in the  
 10 pharmacies or in the box stores ... open to the public" -- where counter clerks "do[] both the  
 11 cashiering as well as [the film processing]" -- the counter clerk position she identified would be  
 12 performed "in a lab where the film is sent off." In giving this testimony, the VE identified the non-  
 13 public setting in which the counter clerk job she identified would be performed -- in a film  
 14 processing lab. She also contrasted the setting in which the DOT's description of the job of  
 15 counter clerk would be performed -- i.e., in a pharmacy or a photo development store that is "open  
 16 to the public" -- with the lab setting of the counter clerk job she was identifying. The Court finds  
 17 that the VE's explanation that the job of counter clerk she identified is performed in a lab setting  
 18 justifies the conflict between her testimony and the DOT's description of the job of counter clerk  
 19 as requiring customer interaction.<sup>4</sup> See Massachi, 486 F.3d at 1154 n.19.

20 Plaintiff also argues that DOT No. 249.366-010 conflicts with the VE's testimony in that the  
 21 job of counter clerk involves fast-paced work and may require hypervigilance. Specifically, plaintiff  
 22 asserts that "[t]his work may ... [be] considered ... fast paced in that there may be a lot of  
 23 customers at one time or a lot of photographs that need to be printed or a deadline to get the film  
 24 and photos processed." [JS at 5.] He also asserts that "hypervigilance is required when  
 25 processing the film to make sure the photographs are printing correctly and are not being

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26  
 27 <sup>4</sup> For the same reason, plaintiff's contention that "if something goes wrong during the printing  
 28 process and the photos become wrecked or damaged, this individual may need to deal with the  
 customer directly to solve the problem" is rejected. [See JS at 5.]

1 destroyed by the printing machine." [Id.] These assertions are merely speculative. The DOT  
 2 description of the job of counter clerk does not contain any indication that the nature of loading film  
 3 into processing equipment is fast-paced, and if plaintiff's reasoning on this issue were valid, it  
 4 could be used to preclude any job at step five for an individual precluded from fast-paced work  
 5 based on the *possibility* that the job could at times be busy. Neither does DOT No. 249.366-010  
 6 include any indication that hypervigilance is needed to use the film processing equipment.  
 7 Instead, the DOT describes the film processing aspects of the job as: "[r]eceives film for  
 8 processing," and "[l]oads film into equipment that automatically processes film, and routes  
 9 processed film for subsequent photo printing." DOT No. 249.366-010. Finally, the VE was aware  
 10 of the limitations precluding fast-paced work and hypervigilance, and as noted supra, she testified  
 11 that there was no conflict between the DOT and her testimony that an individual with these  
 12 limitations can perform the job of a counter clerk. "A VE's recognized expertise provides the  
 13 necessary foundation for his or her testimony." Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir.  
 14 2005). Thus, plaintiff's unsupported assertions do not establish that there is any conflict between  
 15 DOT No. 249.366-010 and the VE's testimony that an individual precluded from fast-paced work  
 16 and hypervigilance can perform the job of counter clerk.

17 Based on the foregoing, the Court finds that the VE provided a sufficient explanation for her  
 18 testimony, in deviation from the DOT, that an individual precluded from public interaction can  
 19 perform the work of a counter clerk. The Court also finds that there was no conflict between the  
 20 DOT and the VE's testimony that someone who cannot perform fast-paced work or work requiring  
 21 hypervigilance can perform the job of counter clerk. Remand is not warranted. See Moncada, 60  
 22 F.3d at 523 (ALJ's decision will be disturbed only if it is not supported by substantial evidence or  
 23 if it is based upon the application of improper legal standards).

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## **CONCLUSION**

**IT IS HEREBY ORDERED** that: 1. plaintiff's request for reversal, or in the alternative, remand, is **denied**; and 2. the decision of the Commissioner is **affirmed**.

**IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

DATED: August 19, 2013

*Paul L. Abrams*  
PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE

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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE